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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

REGINA MARGARET AGUILAR,

Defendant and Appellant.

D074450

(Super. Ct. No. BLF004751)

ORDER MODIFYING OPINION
AND DENYING REHEARING

NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed on March 19, 2019, be modified as follows:

The paragraph beginning on the bottom of page 18 and continuing on to page 19, beginning "Further, as discussed *ante*," is deleted and the following paragraph is inserted in its place:

Further, as discussed *ante*, the law did not permit the jury to consider Aguilar's voluntary intoxication with respect to her claim of imperfect self-defense. Thus, Aguilar's credibility was effectively relevant only on the question of whether Nereida presented, or Aguilar actually believed Nereida presented, a real and credible threat to Aguilar—absent any heightened perception Aguilar may have had due to her use of methamphetamines—but even Aguilar could not recall the

specifics of the threat, the fight, or why she needed to stab Nereida approximately 40 times. Ultimately, the jury found Aguilar not guilty of first-degree murder, indicating it believed she did not intend to murder Nereida—likely believing her methamphetamine use negated her ability to act with intent, deliberation, or premeditation; and, instead, the jury found Aguilar guilty of second-degree murder—indicating it was not convinced Nereida posed a real or actually perceived threat of imminent harm. Given that Aguilar herself could not adequately articulate that threat at trial, we do not believe the two questions the prosecutor asked Chief Wade about Aguilar's termination of the interview on the day of the murder, or the prosecutor's brief reference to that testimony during closing arguments, had any effect on the verdict.

There is no change in judgment.

Appellant's petition for rehearing is denied.

BENKE, Acting P. J.

Copies to: All parties

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(Super. Ct. No. BLF004751)

APPEAL from a judgment of the Superior Court of Riverside County, Graham
Anderson Cribbs, Judge. Affirmed.

Gene D. Vorobyov, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General,
Michael Pulos and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and
Respondent.

After consuming methamphetamine, Regina Margaret Aguilar stabbed Nereida V.¹ approximately 43 times, causing Nereida's death. Aguilar was arrested and charged with murder. At trial, she admitted stabbing Nereida but claimed she was acting in actual or imperfect self-defense as Nereida had initiated the altercation by attacking her with a knife causing Aguilar to fear for her own life. The jury found Aguilar guilty of second degree murder.

Aguilar appeals and asserts the trial court erred by instructing the jury that it could not consider Aguilar's voluntary intoxication with respect to her claim of imperfect self-defense. In addition, Aguilar argues the prosecutor committed misconduct by improperly referring to Aguilar's postarrest silence, improperly lowering the burden of proof by asserting the jury had to believe all of Aguilar's testimony to find her not guilty, and by misstating the evidence and disparaging defense counsel when she objected during his closing argument. We conclude the superior court properly instructed the jury regarding voluntary intoxication and any misconduct on the part of the prosecutor was not prejudicial. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Aguilar began smoking methamphetamine at the age of 16. She considered herself a "dope fiend" and would often stay awake for weeks at a time while consuming

¹ To preserve privacy and in accordance with California Rules of Court, rule 8.90(b), we refer to certain individuals by their first name and last initial, and thereafter by first name only. No disrespect is intended.

the drug. At 17, she ran away to live on the streets with an older man and, thereafter, was involved in two physically abusive relationships.

In early 2008, when Aguilar was approximately 23 years old, she started a relationship with Dean R. The two regularly consumed methamphetamine together. In March of that year, Aguilar and Dean went to Blythe to stay with Dean's sister, Brandi R., because they had been evicted from Aguilar's home and her former boyfriend was threatening them. Aguilar was not sure what day it was when they left as she and Dean had been smoking methamphetamine for several days and had not slept much.

Brandi was not home when Dean and Aguilar arrived at her apartment, but Nereida, a friend of Brandi's who lived in the same apartment complex, was there watching Brandi's children. Dean had been friends with Nereida in the past and had dated her for a short period before he became involved with Aguilar, but this was the first time that Aguilar had met Nereida.

Aguilar and Dean spent the night at Brandi's apartment and the next day, while Brandi was out, Dean began calling around looking for drugs. Nereida told him there was some methamphetamine in a locked closet on Brandi's patio, so Dean picked the lock and Nereida took some of the drugs and gave some to Dean. Dean paid Nereida for the drugs and smoked them with Aguilar. According to Aguilar, Nereida also smoked with them before leaving.

Later that day, Dean became concerned that he did not know who the methamphetamine they had taken belonged to, so he told Brandi that he and Nereida had taken some from the cabinet. Brandi said that she was holding the methamphetamine for

someone, and they all agreed Brandi would inform the person she was holding it for that she had sold some of the drugs and that she would pay the person for what was taken. Dean thought the issue was resolved without any significant conflict, but Aguilar thought Dean and Brandi were upset with one another, and Brandi thought Dean was upset because she believed Nereida instead of him.

That evening, Aguilar went over to Nereida's apartment. They smoked methamphetamine together and talked about their past relationships, including that both had been in relationships with women. Eventually, Dean came to get Aguilar but Nereida asked her to come back again later, without Dean. Dean and Aguilar spent the remainder of the evening watching television together. They did not sleep.

March 15, 2008

On the morning of March 15, 2008, Aguilar went back to Nereida's apartment. She told Dean she was going to have sex with Nereida and, according to Aguilar, Dean said that was okay as long as there were no men involved. However, Dean was upset because he thought Aguilar was going to cheat on him, so he walked down the street to the liquor store to buy some beer. After getting the beer, he came back to the apartment complex and walked around for a few minutes, thinking he might catch Aguilar with another man.

Around the time Dean was returning, Aguilar burst into Brandi's apartment, waking Brandi and her daughter who had been sleeping on the couch in the living room. Aguilar said that she had been in a fight and asked Brandi to hide a large, rolled-up piece of plastic. Aguilar was acting scared and hysterical and Brandi noticed that she was

barefoot, which Brandi thought was strange because Brandi had recently given her shoes to borrow. Aguilar was looking for Dean and when he appeared at the front door, she ran to him and said, "Help me, dad." Brandi was concerned by Aguilar's erratic behavior and told her and Dean they needed to leave. Aguilar took off running towards a dumpster in the apartment complex. Dean looked around, saw Aguilar climbing out of the dumpster, and followed her down the street.

Dean caught up to Aguilar and asked her what happened. She responded that it was not her fault and that it was self-defense but did not explain further. Dean kept pressing Aguilar for details and she eventually told him that while she and Nereida were having sex, Nereida stabbed her so she stabbed Nereida back, and that they had fought. She reiterated that it was not her fault. Dean did not see any injuries on Aguilar but he thought she looked beat-up, as if she had been fighting for a long time. He tried to get Aguilar to return to the apartment complex but she would not, so he left her on the street and went to another family member's home.

Meanwhile, Brandi called a friend to see if she could give her and her daughter, who was not feeling well, a ride to the hospital. When the friend arrived, Brandi called Nereida to see if she could watch her other children while they were gone. Nereida did not answer and Brandi became concerned something had happened to her, so Brandi and her friend went over to Nereida's apartment. The apartment was on the second floor and Brandi and her friend noticed blood on the railing as they walked up the stairs. They approached the door and saw that it was slightly ajar. Concerned by the blood and the door, they called the police. They did not enter the apartment.

Initial Investigation

Officer Corey Ploesch from the Blythe Police Department arrived on the scene at approximately 10:52 a.m. on March 15 to assist another officer, Detective Scott Adams, with a welfare check of Nereida's apartment. Ploesch and Adams entered the apartment and immediately noticed blood on the walls. Upon further investigation, they discovered Nereida's body on the floor in the living room. Nereida did not have any clothes on and her body was covered in puncture wounds. Detective Adams went over to check if she was alive while Officer Ploesch secured the rest of the apartment.

As he walked down the hallway towards the back of the apartment, Officer Ploesch heard coughing coming from one of the bedrooms and then a small child, around three to four years of age, came running up to him. The child was wearing dark-colored shorts and a light-colored T-shirt and there was a dark substance that looked like blood or dirt on his arms, face, and clothing. Officer Ploesch picked up the child, and finding no other individuals inside, finished securing the apartment. He then took the child outside, where he located the child's grandmother.

Detective Adams determined that Nereida did not have a pulse and called for additional backup while Ploesch began to secure the crime scene. The police photographed the location of Nereida's body and blood splatters on various walls surrounding it. They did not find any drugs or weapons in the area surrounding the body. They found blood in the bathroom and a significant amount of blood on the floor in the hallway outside the bathroom and photographed those areas as well. In the kitchen, they found a plate of food and some cooking oil on the stove, and a chair sitting next to the

stove. Outside, they recovered some clothing, a white shoe, and a burgundy towel rolled up in a plastic children's pool from a dumpster on the property. They were not able to locate the weapon used to kill Nereida.

Initial Contact and Interview of Aguilar

Aguilar returned to the scene between 7:00 and 8:00 p.m. She was wearing dirty clothing and sunglasses, had no shoes, and had a cut on her hand. An officer contacted Aguilar and she told the officer that she was there because her sister lived inside the apartment. She did not mention Brandi, Dean, or Nereida. The police took Aguilar into custody and transported her to the hospital due to the injury to her hand.

While at the hospital, Jeffrey Wade, Chief of the Blythe Police Department, advised Aguilar of her *Miranda*² rights and asked if she would answer some questions. After stating that she understood the *Miranda* warnings, Aguilar agreed to speak to Chief Wade. Aguilar was coherent and was able to answer basic questions such as her name, date of birth, and address, although she also displayed signs of being under the influence of narcotics, including being extremely fidgety and having a dry mouth.

She told Chief Wade that she came to Blythe with her boyfriend, Dean, to visit his family and that they were staying with Dean's sister. She stated that she had been using drugs for the previous two weeks and that she had smoked methamphetamine with Nereida that morning, after going over to her apartment to engage in sexual activity with her. She explained that they both removed their clothes, that Nereida was lying flat on

² *Miranda v. Arizona* (1966) 384 U.S. 436, 467-473.

the couch on her stomach, and that she was positioned behind and on top of Nereida, orally copulating her, when Nereida suddenly reached back with a knife in her right hand and cut Aguilar's left pinky finger.

Chief Wade asked Aguilar to clarify the position of the bodies several times and Aguilar consistently described the same positions. She went on to explain that she and Nereida fought over the knife and that Nereida called her a "bitch" at one point during the fight. When Chief Wade attempted to clarify portions of Aguilar's story, Aguilar terminated the interview.

Forensics

An autopsy confirmed that Nereida died because of bleeding from multiple stab wounds. There were 43 wounds in all, including bruises, incisions, and abrasions located throughout Nereida's body. She also had a perforated lung and a fractured rib. However, the pathologist concluded some of the injuries and wounds may have been sustained prior to the murder as some appeared to be in various stages of healing.

Blood taken from both Aguilar and Nereida on the day of the murder tested positive for methamphetamines. The police also tested blood found on the shoe recovered from the dumpster and confirmed that it contained Nereida's DNA.

Trial Testimony

Aguilar was charged with murder in violation of Penal Code section 187, subdivision (a).³ At trial, she admitted that she stabbed Nereida, but claimed she was

³ All further statutory references are to the Penal Code.

acting in self-defense or imperfect self-defense because she feared for her life, either because she was actually in danger when Nereida attacked her with the knife, or because her altered state of consciousness due to her use of methamphetamines caused her to believe she was in danger.

Aguilar testified and explained that she went back to Nereida's apartment alone that morning and smoked methamphetamine with her on the couch. Aguilar asked Nereida if she wanted to engage in certain sexual acts with her; Nereida agreed; and they both got undressed. Aguilar stated that Nereida was positioned with one knee on the floor, one knee on the couch, and her hands on the seat of the couch, and that she was kneeling behind Nereida with one foot and one knee on the ground. Nereida looked back at Aguilar over her right shoulder with a suspicious expression and, when Aguilar shifted her position, Nereida came at Aguilar with a silver and black object. Aguilar put her left hand up to block, the object hit her hand, and the two fell over and started wrestling on the ground. Aguilar grabbed Nereida's hand that was holding the knife and, somehow during the struggle, the knife went into Nereida's neck. Nereida pulled it out and the two continued to fight.

Aguilar did not recall the specifics of what happened after that, but she did recall being afraid that she would never see her child again. She testified that the fight lasted a long time and finally ended when she became tired. Aguilar then realized she was covered in blood so she took a shower and put on some clothes she found in the bathroom. She gathered her bloody clothes from the living room floor, wrapped them in a plastic toy, and picked up the bloody knife and put it in her pocket. She then ran over

to Brandi's apartment to seek help. Aguilar did not have any recollection of speaking with Chief Wade at the hospital later that night.

The defense hired Dr. Michael Kania to complete a psychological evaluation of Aguilar. He testified that Aguilar's long-term chronic abuse of methamphetamines, and the resulting periods of minimal sleep, caused her to be paranoid and at times to hear voices. Given her history and her description of the encounter with Nereida, Dr. Kania opined that Aguilar's response was consistent with a person that perceived a sudden threat and entered a fight reaction, akin to the fight or flight reaction most individuals have when faced with a threat. He further opined that her use of methamphetamines and lack of sleep may have heightened her perception of the actual risk. Finally, Dr. Kania noted that Aguilar's inability to remember the details of what occurred that day was consistent with a typical reaction to such a traumatic experience.

Rebuttal Testimony

The prosecution called Chief Wade as a rebuttal witness and he relayed the conversation he had with Aguilar at the hospital, including her description of how the fight first began, which differed from her testimony at trial. On cross-examination, defense counsel pointed out several statements that were consistent between Aguilar's postarrest statement and her testimony at trial. In response, the prosecutor pointed out that Aguilar had not told him some of the more significant details she testified to at trial and asked, "[a]t some point when you ask her to fill in the gaps between what transpired, does she terminate the interview?" Chief Wade replied, "yes." Defense counsel then pointed out that Chief Wade had not asked Aguilar specific questions about the

inconsistent details and the prosecutor followed up by asking, "[a]nd when she was given the opportunity to tell you what happened, she terminated the interview?" Chief Wade confirmed that Aguilar did not provide any further information and terminated the interview, and that concluded his testimony.

Instruction and Verdict

Amongst various other instructions, the court instructed the jury on its use of evidence related to voluntary intoxication as follows: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill which is express malice or the defendant acted with deliberation and premeditation. A person is voluntarily intoxicated if he or she becomes intoxicated by willfully using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect or willingly assumed the risk of that effect. You may not consider evidence of voluntary intoxication for any other purpose."

The jury found Aguilar not guilty of first degree murder but guilty of second degree murder.

Aguilar appeals.

DISCUSSION

I. Voluntary Intoxication Jury Instruction

Aguilar asserts the trial court erred by instructing the jury that it could not consider evidence regarding her voluntary intoxication when evaluating her claim of imperfect

self-defense.⁴ As the parties acknowledge, a similar issue involving an almost identical instruction was pending before the California Supreme Court during briefing in the present case. After briefing was completed in this case, the California Supreme Court issued its opinion in the pending case, *People v. Soto* (2018) 4 Cal.5th 968 (*Soto*), and therein affirmed the use of the nearly identical involuntary intoxication instruction.

In *Soto*, as in the case at hand, the defendant stabbed the victim to death while under the influence of methamphetamines but claimed he could not be guilty of murder because he believed that he needed to act in self-defense, even if that belief was unreasonable and simply a result of his voluntary methamphetamine use. (*Soto, supra*, 4 Cal.5th at pp. 971-973.) Despite the asserted defense, the trial court in *Soto* instructed the jury using CALCRIM No. 625, as follows: " ' "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation, or the defendant was unconscious when he acted. Voluntary intoxication can only negate express malice, not implied malice. [¶] . . . [¶] You may not consider evidence of voluntary intoxication for any other purpose." ' " (*Id.* at p. 973.) Also, as in the present case, the jury acquitted Soto on

⁴ The People assert Aguilar forfeited this argument by stipulating to the instruction at trial. Aguilar concedes that her counsel did not object but asserts, in the alternative, that her counsel was ineffective for having failed to do so. Given the recent authority from the California Supreme Court on this exact issue, and to forestall Aguilar's alternative claim of ineffective assistance of counsel, we exercise our discretion to consider the merits. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 146 (*Crittenden*).)

first degree murder but found him guilty of second degree murder. (*Ibid.*) Soto appealed, claiming the voluntary intoxication instruction amounted to prejudicial error. (*Ibid.*)

On appeal, the California Supreme Court addressed whether section 29.4, subdivision (b), which makes evidence of voluntary intoxication admissible to negate express malice, also permits evidence of involuntary intoxication to prove a defendant alleging imperfect self-defense believed it was necessary to act in self-defense. (*Soto*, *supra*, 4 Cal.5th at p. 970.) The court reviewed the legislative history of section 29.4⁵ and concluded the Legislature did not intend to permit a defendant to present evidence of voluntary intoxication to prove the defendant was unaware, due to intoxication, that the victim posed no actual threat. (*Soto*, at pp. 978-979.) In particular, the court concluded the Legislature intended to alert criminal defendants, " 'If you voluntarily choose to become intoxicated and then kill someone, you may not claim you were so intoxicated you were unaware your victim posed no threat to you when you killed, although you may claim you were too intoxicated to intend to kill or premeditate' " (*Ibid.*)

Accordingly, the court concluded the trial court properly instructed the jury with respect to its use of evidence of the defendant's voluntary methamphetamine intoxication. (*Id.* at p. 981.)

⁵ In a motion filed on January 1, 2018, the People ask this court to take judicial notice of several documents related to the legislative history of section 29.4, as well as former section 22, as relevant to the instruction on voluntary intoxication. As we rely, instead, on the binding authority from the California Supreme Court in *Soto*, we need not consider these materials and therefore deny the People's request for judicial notice.

We see no discernable difference with respect to the trial court's instruction here. Just as the defendant in *Soto* had done, Aguilar asserted her voluntary methamphetamine intoxication, along with her history of methamphetamine abuse and related lack of sleep, caused her to have a "flawed perception of danger" that amounted to imperfect self-defense. Also as in *Soto*, on appeal, Aguilar relies primarily on section 29.4 to argue the trial court's instruction should have permitted the jury to consider voluntary intoxication with respect to imperfect self-defense. Consistent with the recent holding in *Soto*, though, the trial court here properly permitted the jury to consider Aguilar's intoxication with respect to her ability to form the necessary malicious intent for first degree murder, but did not permit the jury to consider her intoxication with respect to any perceived, but not actual, threat. The instruction given to the jury was nearly identical to the instruction the trial court gave the jury in *Soto* and, as the California Supreme Court in *Soto* affirmed that instruction, we conclude there was no instructional error here.

Aguilar also asserts the prosecutor compounded the alleged instructional error during closing arguments by asserting evidence of voluntary intoxication was not relevant to implied malice. As with the instruction given by the court, the prosecutor's argument was consistent with the recent holding in *Soto* and, accordingly, we conclude it was not error.

Finally, as we conclude there was no error in the instruction or the prosecutor's argument with respect to the proper use of evidence of voluntary intoxication, we need not address whether such error was prejudicial.

II. *Doyle Error*

Aguilar next contends the prosecutor committed prejudicial misconduct by commenting on Aguilar's invocation of her right to remain silent during the examination of Chief Wade.⁶ Specifically, Aguilar asserts the prosecutor violated her federal due process rights by twice asking Chief Wade whether Aguilar terminated the interview when he tried to ask additional questions. The People respond that the prosecutor was simply impeaching Aguilar based on inconsistencies between her testimony and her prior statement to Chief Wade, and was not commenting on her invocation of the right to remain silent.

When a defendant is given a *Miranda* warning, she is informed that her silence, or refusal to answer questions posed by law enforcement, will not be used against her. (*People v. Lewis* (2004) 117 Cal.App.4th 246, 256; *Fletcher v. Weir* (1982) 455 U.S. 603, 606.) Given that representation, a prosecutor that later comments on the defendant's silence—or failure to answer questions or disclose exculpatory facts or evidence—after the defendant has been arrested and read a *Miranda* warning may violate the defendant's right to due process under the Fourteenth Amendment. (*Doyle v. Ohio* (1976) 426 U.S. 610, 619-620 (*Doyle*).) Such errors are commonly referred to as *Doyle* errors, and a prosecutor can commit a prejudicial *Doyle* error by asking a single question that

⁶ As with the alleged instructional error, the People contend Aguilar forfeited this argument by failing to object and Aguilar concedes her counsel did not object but asserts an ineffective assistance of counsel claim in the alternative. We again exercise our discretion to consider the merits to forestall ineffective assistance of counsel. (See *Crittenden*, *supra*, 9 Cal.4th at p. 146.)

improperly refers to the defendant's silence during cross-examination of a witness. (*Lewis, supra*, 117 Cal.App.4th at p. 256.)

However, if the defendant waives her *Miranda* rights and voluntarily speaks to law enforcement, the defendant has not chosen to remain silent. (Evid. Code, §§ 769, 770, 780, subd. (h), 1235; *Anderson v. Charles* (1980) 447 U.S. 404, 408.) In such cases, anything the defendant *does* say, including any statements that are inconsistent with the defendant's testimony later at trial, may be used to impeach the defendant's credibility. (*Anderson, supra*, at p. 408; *People v. Hurd* (1998) 62 Cal.App.4th 1084, 1093-1094 ["We do not think *Doyle* was meant to preclude the prosecutor from commenting on highly relevant evidence bearing on appellant's credibility, including appellant's refusal to provide critical details, when he had voluntarily waived his right to remain silent."]; *U.S. v. Hale* (1975) 422 U.S. 171, 176.)

Here, Aguilar voluntarily spoke to Chief Wade after he read her her *Miranda* rights, but then terminated the interview. Subsequently, Aguilar testified at trial and the prosecutor called Chief Wade as a rebuttal witness for the express purpose of impeaching Aguilar's credibility by pointing out inconsistencies between her testimony and her statement to Chief Wade on the day of the murder. After the defense cross-examined Chief Wade and pointed out certain consistent statements, the prosecutor asked whether Aguilar told him several key facts that she testified to at trial and then ended by asking if Aguilar terminated the interview when Chief Wade tried to "fill in the gaps." Similarly, after defense counsel followed up with additional questions implying that Chief Wade

had not asked specific questions about the omitted details, the prosecutor again clarified that when he had tried to do so, Aguilar had terminated the interview.

When read in conjunction with the entirety of Chief Wade's testimony, it seems the purpose of the allegedly improper questions was not to imply that Aguilar's termination of the interview indicated, itself, that she was guilty, but was instead to impeach Aguilar's credibility by pointing out the differences, or gaps, between Aguilar's postarrest statement, offered immediately after the murder, and her testimony at trial, nearly eight years later. (See *People v. Champion* (2005) 134 Cal.App.4th 1440, 1448, 1450-1451; *People v. Cartwright* (1980) 107 Cal.App.3d 402, 415 ["A defendant testifying on his own behalf at a criminal trial exposes himself to cross-examination and to explanation concerning his credibility and the reliability of his testimony."].) Moreover, the prosecutor only asked the allegedly improper questions in response to defense counsel's cross-examination, in which she suggested Aguilar's statement was consistent and Chief Wade just did not ask specific enough questions.

Regardless, even if the prosecutor did commit *Doyle* error by referring to Aguilar's termination of the interview, we conclude any such error was harmless beyond a reasonable doubt and, therefore, does not require reversal. (See *People v. Quartermain* (1997) 16 Cal.4th 600, 621; *People v. Galloway* (1979) 100 Cal.App.3d 551, 559; *Chapman v. California* (1967) 386 U.S. 18.) To determine whether reversal is necessary based on a *Doyle* error, we must consider the extent of the comments made, how the statement would have been understood by a reasonable juror in context, whether the prosecutor suggested an inference of guilt based on the invocation, and the overall

strength of the case. (*People v. Benson* (1990) 52 Cal.3d 754, 793 (*Benson*); *People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1559.) We will not assume that the jury drew the most damaging meaning possible from the disputed comments; instead, the defendant must establish a reasonable likelihood that the jury understood and applied the comments in an improper manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970 (*Frye*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 420 (*Doolin*); *People v. Spector* (2011) 194 Cal.App.4th 1335, 1403 (*Spector*).)

As discussed, the prosecutor here asked only two allegedly improper questions in response to defense counsel's cross-examination of Chief Wade and the questions did not suggest that Aguilar's invocation, alone, raised an inference of guilt. Instead, a reasonable juror would have understood that the prosecutor was simply pointing out that Aguilar's earlier statement was inconsistent and lacked key details, and that Aguilar failed to provide additional details when given the opportunity to do so.

Aguilar argues the error was nevertheless particularly prejudicial because, as the sole eye witness to the murder, her testimony and credibility were critical. However, Aguilar did not deny stabbing Nereida; the prosecution also presented forensic evidence conclusively linking Aguilar to the murder; and both Brandi and Dean testified regarding Aguilar's statements and demeanor shortly after the altercation. Thus, the prosecutor presented significant evidence of Aguilar's guilt, and the only real dispute was whether Aguilar was acting in self-defense.

Further, as discussed *ante*, the law did not permit the jury to consider Aguilar's voluntary intoxication with respect to her claim of imperfect self-defense. Thus,

Aguilar's credibility was effectively relevant only on the question of whether Nereida presented a real and credible threat to Aguilar—absent any heightened perception Aguilar may have had due to her use of methamphetamines—but even Aguilar could not recall the specifics of the threat, the fight, or why she needed to stab Nereida approximately 40 times. Ultimately, the jury found Aguilar not guilty of first degree murder, indicating it believed she did not intend to murder Nereida—likely believing her methamphetamine use negated her ability to act with intent, deliberation, or premeditation; and, instead, the jury found Aguilar guilty of second degree murder—indicating it was not convinced Aguilar's perception that Nereida posed a threat was reasonable. Given that Aguilar herself could not adequately articulate that threat at trial, we do not believe the two questions the prosecutor asked Chief Wade about Aguilar's termination of the interview on the day of the murder had any effect on the verdict.

III. *Additional Prosecutorial Misconduct During Closing Arguments*

Aguilar contends the prosecutor also committed prejudicial misconduct during his closing argument, by suggesting the jury had to believe all of Aguilar's testimony to acquit, by misstating the evidence, and by disparaging defense counsel for objecting to the misstatements.

A prosecutor has wide latitude to argue his or her case vigorously, but improper argument may amount to prejudicial misconduct if a prosecutor uses deceptive or reprehensible methods to persuade the jury or infects the trial with such unfairness as to make the conviction a denial of the defendant's constitutional right to due process.

(*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*); *People v. Tully* (2012) 54 Cal.4th 952,

1009-1010.) A prosecutor need not act in bad faith to commit misconduct, but the defendant must have been prejudiced as a result. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.)

To determine whether the alleged misconduct was sufficiently prejudicial as to require reversal, we consider "how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument." (*People v. Woods* (2006) 146 Cal.App.4th 106, 111; *Benson, supra*, 52 Cal.3d at p. 793.) As discussed, *ante*, it is the defendant's burden to establish a reasonable likelihood that the jury understood and applied the comments in an improper manner. (*Frye, supra*, 8 Cal.4th at p. 970, disapproved on other grounds in *Doolin, supra*, 45 Cal.4th at p. 420; *Spector, supra*, 194 Cal.App.4th at p. 1403.) The conduct is prejudicial under the federal constitution when it infects the trial with such unfairness to deny the defendant due process and is prejudicial under state law when the prosecutor uses reprehensible or deceptive methods to attempt to persuade the jury. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1216; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1215.) A finding of prejudice under either standard requires reversal. (*Hajek*, at p. 1216; *Gionis*, at pp. 1214-1215.)

A. Reasonable Doubt Standard

During his closing argument, the prosecutor stated, "In order for you to find . . . Ms. Aguilar not guilty of murder and to find her guilty of involuntary manslaughter—or voluntary manslaughter, you have to believe every single part of this flawed testimony that she provided you." Defense counsel objected as misstating the

law,⁷ the trial court overruled the objection, and the prosecutor continued, "every single part of it because if you don't, you may take into consideration the fact that she is wrong, that she is lying. But, more importantly, every part of that statement when she is wrong and lying does not conform to the physical evidence in the case."

Aguilar asserts there is a reasonable likelihood the jury understood this argument in a way that misstated the reasonable doubt standard and shifted the burden of proof to the defense. We disagree. Aguilar improperly focuses on the first part of the argument, before the objection, but the remaining portion after the objection clarified that the prosecutor was making an argument about Aguilar's credibility, not the burden of proof. While we agree with Aguilar that the jury could have believed some, but not all, of Aguilar's testimony, any reasonable juror would have understood the point the prosecutor was making was that if the jury believed Aguilar was lying about anything, that affected her credibility and gave the jury reason to consider whether she was lying about other things, particularly given the inconsistencies between her testimony and the physical evidence. Because Aguilar admitted stabbing Nereida and her testimony was the only evidence suggesting that Nereida attacked her first, her testimony was essential to her defense, as the prosecutor pointed out. This argument was well within the wide latitude given to prosecutors to argue their case and was not inconsistent with the law. (See

⁷ The People argue Aguilar forfeited this argument despite the objection because defense counsel did not specifically assert the argument improperly shifted the burden. We conclude the objection was sufficient to alert the court and the parties to the issue, and therefore address the argument on the merits.

People v. Centeno (2014) 60 Cal.4th 659, 672 [prosecutor may suggest the jury should reject unreasonable interpretations of the evidence].)

In any event, Aguilar concedes the jury was properly instructed on the law regarding the burden of proof and, specifically, reasonable doubt. We presume the jury understood and followed the instruction. (See *People v. Martinez* (2010) 47 Cal.4th 911, 957 (*Martinez*).)

B. Alleged Misstatements and Response to Defense Counsel's Objections

Aguilar also asserts the prosecutor made several material misrepresentations of fact during his closing, and that the prosecutor's improper response when defense counsel objected to the misstatements further compounded the error.

1. Aguilar's Testimony that Dean Let Her Go to Nereida's

First, Aguilar asserts the prosecutor incorrectly stated that Aguilar testified that Dean would not have let her go to Nereida's alone if he knew there were drugs there. We agree that this was not an accurate representation of Aguilar's testimony. (*Hill, supra*, 17 Cal.4th at pp. 823, 827-828.) Aguilar testified that Dean was okay with her going over to Nereida's to have sex with her, but that he would not have allowed her to go if there were guys there. She did not say anything about drug use.

However, this minor misstatement was not prejudicial under any standard. First, there was ample evidence suggesting the underlying assertion, that Dean would not have let Aguilar go to Nereida's alone if he knew there were drugs there, was true. Dean, Aguilar, and Nereida were all regular methamphetamine users and they had essentially stolen methamphetamine from a locked cabinet at Brandi's apartment to smoke in the day

or two preceding the murder. Thus, it was reasonable for the jury to infer that Dean would have wanted to go to Nereida's with Aguilar had he known they were going to smoke more methamphetamine. The only part of the prosecutor's argument that was inaccurate was that Aguilar testified to this fact at trial. However, the jury had the testimony available and could have easily determined that Aguilar did not actually state that, but also that it was likely true in any event. Regardless, the point the prosecutor was making was that Aguilar lied to Dean to be able to go over to Nereida's alone—so she could murder Nereida—and in making that argument, he focused more on Aguilar's assertion that she planned to have sex with Nereida, which he also argued was false, than on the drug use. If the jury believed Aguilar lied to Dean so she could go over alone and kill Nereida, whether she lied about the sex or the drug use, or both, was insignificant.

2. Attire of Boy Found in Nereida's Apartment

Next, Aguilar asserts the prosecutor erred by arguing that the child found in the apartment after the murder was dressed for the day in jeans and a T-shirt, indicating that Nereida had not been so high that she could not take care of him. While there was some discrepancy in the testimony and photos taken at the crime scene concerning the child's exact outfit, Officer Ploesch testified that the child was wearing a light-colored shirt and dark-colored shorts, and that his outfit was similar to the outfit depicted in a picture admitted into evidence in which the child was wearing jean shorts and a T-shirt. In addition, another officer that collected materials from the crime scene on the day of the murder testified that the clothes in the photo were the clothes that the child was wearing that day, and that he had been informed that they were the clothes he was wearing while

still in the apartment. Finally, the prosecutor first asserted the child was dressed for the day and, based on defense counsel's objection, rephrased to assert only that "it would appear that he is dressed for the day." The jury had all the testimony available and could weigh any conflicting evidence, but the prosecutor's argument in this regard was reasonable, supported by at least some evidence, and well within the wide latitude given during closing arguments.

3. *Food on the Stove*

Photographs of Nereida's kitchen, taken on the day of the murder, were entered into evidence at trial. Based on those images, the prosecutor argued, "We've got the stove. We've got the light on above the stove. What is that indicative of? These are reasonable interpretations, folks. She's got the light on, the stove, the oil, the pan, the bacon. It's reasonable that she is just making breakfast for that little boy moments before this happened."

Aguilar asserts this was a misstatement of facts and prosecutorial error because there was no evidence regarding the temperature of the food or of Nereida's typical morning routine and that there was therefore no "rational evidentiary basis" to claim Nereida was cooking moments before Aguilar arrived. We disagree. The evidence indicated food had been made and it was reasonable for the prosecutor to argue that the jury could infer from the food, which happened to be a common breakfast food, the light, and the overall condition of the stove that it had been made that morning, before the murder. Again, this argument was well within the prosecutor's latitude to argue his case,

and the trial court correctly pointed out that the prosecutor was entitled to argue what he believed the evidence had shown.

Further, the court instructed the jury that the prosecutor's argument was not evidence, and prosecutor followed up by directly stating, "what I'm telling you isn't evidence, but I'm directing you to the evidence and to make reasonable interpretation" of that evidence. Thus, the prosecutor did not misstate the evidence; he simply made an argument based on that evidence, and there is no reasonable possibility that the jury was misled by that argument. (See *Martinez, supra*, 47 Cal.4th at p. 957 [on appeal, we presume the jury understood and followed the court's instructions].)

4. *Response to Objections*

Finally, Aguilar asserts the prosecutor erred by stating that defense counsel "keeps objecting over and over 'Facts not in evidence' because that's the facts. She doesn't like it so she keeps objecting, but that's the evidence." Aguilar contends it is improper for a prosecutor to imply defense counsel fabricated a defense or does not want the jury to hear the truth, but that is not what the prosecutor said here. (Cf. *People v. Herring* (1993) 20 Cal.App.4th 1066, 1076-1077 [improper to say defense counsel "'does not want you to hear the truth'"]; *Hill, supra*, 17 Cal.4th at pp. 833-834 [continuous attacks, including statement that defense counsel was "unprofessional" and "contemptuous" were improper].) In response to defense counsel's repeated objections, which the trial court continued to overrule, the prosecutor was defending his own argument and asserting that he was *not* misstating the evidence.

Aguilar suggests this case is similar to *Hill*, in which the court found continued disparaging remarks against defense counsel rose to the level of misconduct, but the only similarity is that defense counsel continually interrupted the prosecutor's closing argument with objections, many of which were unfounded, as discussed herein. (*Hill, supra*, 17 Cal.4th at pp. 833-834.) The prosecutor commented on the continued objections once, and that comment did not imply that defense counsel was being dishonest or trying to hide the facts, but was instead simply a response to the repeated accusation that he himself was misrepresenting the facts. (See *People v. Huggins* (2006) 38 Cal.4th 175, 207 ["colorful language" aimed at opposing counsel's strategy was not misconduct]; *People v. Charles* (2015) 61 Cal.4th 308, 328-329.) Although the response may have been mildly argumentative, it does not rise to the level of misconduct and, even if it did, was not prejudicial under any standard.

In response to defense counsel's objections throughout the prosecutor's closing, the court repeatedly instructed the jurors they were required to rely on the evidence and the prosecutor's statements were intended to be argument based on that evidence. We presume the jury understood and followed the instruction. (See *Martinez, supra*, 47 Cal.4th at p. 957.)

IV. *Cumulative Error*

Aguilar also contends the cumulative effect of the asserted errors was prejudicial. We disagree. As the only potential errors are the *Doyle* error and the minor misstatements made during closing arguments, and neither of these were particularly prejudicial, we conclude the cumulative error also was not prejudicial.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

IRION, J.